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**IN THE
COURT OF APPEALS OF INDIANA**

BELL FINANCIAL COMMUNITY CREDIT)
UNION and MARK THACKSTON, d/b/a AUTO)
RESOURCES OF ST. ANNE,)

Appellants,)

vs.)

LARRY F. NAGY,)

Appellee.)

No. 45A04-0601-CV-33

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Karl Hand, Judge Pro Tempore
Cause No. 45D11-0508-CC-166

March 8, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Bell Financial Community Credit Union (“Bell”) appeals the Lake Superior Court’s order for it to deliver to Larry Nagy (“Nagy”) the certificate of title to a certain 1997 GMC rollback tow truck. Bell raises two issues, which we combine and restate as: whether the trial court erred when it determined that Nagy was entitled to the certificate of title for the tow truck free of Bell’s security interest in the truck. Concluding that the trial court’s decision is clearly erroneous, we reverse.

Facts and Procedural History

Nagy is the owner of an automobile repair center, towing service, and used car sales center in Lake County, Indiana. Nagy also holds an automobile dealer’s license from the State of Indiana. Mark Thackston (“Thackston”) is the sole proprietor of Auto Resources of St. Anne in St. Anne, Illinois. On February 16, 2005, Thackston pulled into Nagy’s lot to ask directions and the two began discussing the 1997 GMC tow truck Thackston was driving. Thackston told Nagy he had recently purchased the truck, but that a recent hip replacement made it difficult for him to operate the clutch. Nagy agreed to purchase the 1997 GMC tow truck from Thackston for \$17,700, which he tendered in the form of a cashier’s check. When Nagy inquired whether he should make the check payable to Thackston or his finance company, Thackston replied to make the check out to him personally. He then told Nagy that he had applied for the title to the truck from the State of Illinois and he would turn the title over to Nagy once he received it. Nagy took possession of the truck on the date of sale.

Despite Nagy’s repeated calls, Thackston failed to provide Nagy with the certificate of title to the truck. Eventually, Nagy discovered that Thackston had entered

into a finance agreement for the truck with Bell and that Bell had perfected its security interest in the truck on March 15, 2005.

On August 29, 2005, Nagy filed a complaint for replevin against Bell, seeking possession of title to the truck free and clear of Bell's security interest. A hearing was held on October 14, 2005, and pursuant to Bell's request, the trial court entered findings of fact and conclusions of law on December 23, 2005.

In pertinent part, the trial court's findings stated:

2. Nagy bought the Tow Truck in good faith and without knowledge that the sale violated the rights of Bell Financial in the Tow Truck. Nagy's purchase of the Tow Truck was made in the ordinary course of business from Thackston, who was in the business of selling used vehicles. Further, Nagy's purchase of the Tow Truck was in the ordinary course of business because the sale comported with the usual and customary practices of Thackston. The sale of the Tow Truck to Nagy additionally comported with the usual and customary practices in the used automobile business in which Thackston is engaged. Pursuant to I.C. § 26-1-1-201(9), Nagy is a buyer in the ordinary course of business with respect to the Tow Truck. Nagy took possession of the Tow Truck on February 16, 2005, the same day that he issued his payment in the amount of \$17,700 for the Tow Truck.

* * *

10. Pursuant to I.C. § 26-1-9.1-320(1), a buyer in the ordinary course of business takes free of a security interest created by the buyer's seller, even if the security interest is perfected, and the buyer knows of its existence. By statute, as a buyer in the ordinary course of business, Nagy's interest in the Tow Truck and its Certificate of Title takes priority over Bell Financial's security interest in the same, and Nagy took legal title to the Tow Truck free of Bell Financial's security interest.

11. Thackston, d/b/a Auto Resources of St. Anne, operates a used car dealership. Thackston is a merchant who deals in used vehicles like the Tow Truck involved in this litigation.

12. I.C. § 26-1-2-403(2) provides that any entrusting of goods to a merchant who deals in goods of that kind gives the merchant the power to transfer all rights of the entruster to a buyer in the ordinary course of business. Bell Financial . . . entrusted the Tow Truck to Thackston, d/b/a Auto Resources of St. Anne, after it entered into an agreement with Thackston where Bell Financial obtained a security interest in the same.

13. Nagy, as a buyer in the ordinary course of business, obtained legal title to the Tow Truck when Thackston, who was entrusted with the Tow Truck by Bell Financial, sold it to Nagy and provided him with possession of the Tow Truck. Thackston had the power to transfer all rights of Bell Financial to Nagy as a buyer in the ordinary course of business, and he did so on February 16, 2005. By statute, because Bell Financial entrusted the vehicle to Thackston and Nagy was a buyer in the ordinary course of business, Nagy obtained Bell Financial's rights in the Tow Truck, and his interest takes priority over Bell Financial.

Appellant's App. pp. 7, 9-10. Therefore, the trial court ordered Bell to surrender possession of the truck's certificate of title to Nagy. Bell now appeals. Additional facts will be provided as necessary.

Standard of Review

Pursuant to Bell's request and Indiana Trial Rule 52, the trial court in this case entered findings of fact and conclusions of law. Therefore,

[w]e apply a two-tiered standard to review the court's entry. We determine whether the evidence supports the findings and the findings support the judgment. In deference to the trial court's proximity to the issues, we disturb the judgment only where there is no evidence supporting the findings or the findings fail to support the judgment. We do not reweigh the evidence, but consider only the evidence favorable to the trial court's judgment. Challengers thus labor under a heavy burden, but one which may be overcome by showing that the trial court's findings are clearly erroneous.

Oil Supply Co., Inc. v. Hires Parts Service, Inc., 726 N.E.2d 246, 248 (Ind. 2000) (citations and quotations omitted).

It appears that the trial court adopted Nagy's Proposed Findings and Conclusions verbatim. In fact, the judgment actually retains the word "Proposed" in the title of the document. "Although it is not prohibited to adopt a party's proposed order verbatim, this practice weakens our confidence as an appellate court that the findings are the result of

considered judgment by the trial court.” Safety Nat’l Cas. Co. v. Cinergy Corp., 829 N.E.2d 986, 993 n.6 (Ind. Ct. App. 2005), trans denied (citing Cook v. Whitsell-Sherman, 796 N.E.2d 271, 273 n.1 (Ind. 2003)). See also Prowell v. State, 741 N.E.2d 704, 708-09 (Ind. 2001). The critical inquiry remains whether such findings and conclusions, as adopted by the court, are clearly erroneous. See In re Marriage of Nickels, 834 N.E.2d 1091, 1096 (Ind. Ct. App. 2005).

Discussion and Decision

Bell contends that the trial court erred when it determined that Nagy was entitled to possession of the certificate of title to the truck. As an initial matter, we observe that legal title to a vehicle is governed by the sales provisions of the Uniform Commercial Code as adopted by Indiana statute. See Madrid v. Bloomington Auto Co., Inc., 782 N.E.2d 386, 395 (Ind. Ct. App. 2003). Indiana’s UCC provisions provide:

Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place[.]

Ind. Code § 26-1-2-401(2) (2002).

Bell argues that the trial court erred in determining that Nagy was a buyer in the ordinary course of business, and therefore erred in failing to recognize that Bell was entitled to possession of the certificate of title as the holder of a valid security interest in the tow truck.

Indiana Code section 26-1-9.1-320(a) (2002) provides that “a buyer in ordinary course of business takes free of a security interest created by the buyer’s seller, even if

the security interest is perfected and the buyer knows of its existence.” A “buyer in the ordinary course of business” is defined as:

a person that buys goods in good faith without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course of business if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices.

Ind. Code § 26-1-1-201(9) (2002).

Bell asserts that Nagy cannot be considered a buyer in the ordinary course of business for several reasons. First, Bell contends that there is no evidence supporting the trial court’s finding that Thackston was a used car dealer and thus a seller of goods of that kind. Our review of the record reveals that Nagy testified at the hearing that Thackston represented himself as the sole proprietor of “Auto Resources” and that Thackston’s truck had a “towing or recovery plate[.]” Tr. p. 25. Nagy’s testimony at trial did not offer any further indication that Thackston was a dealer:

Q That’s right. Now, you indicated Mr. Thackston here that you—through the business cards and your dealings with him and I think you said something about the plates, this led you to believe he was a dealer, also, correct?

A No. I didn’t say anything about his plates.

Q What kind of plates?

A A towing or recovery plate I think.

Q All right. He handed you a card, though, correct?

A. Uh-huh.

Q Okay. And, in fact, on—let’s take another look at—oh, the card. What did the card say, if you recall, his business card?

A I know it had a fax number and a—I think it said Auto Resources.

Q Auto Resources. It sounds like a dealership, doesn’t it?

A No. It said on there Auto Recovery.

Q Auto Resources? Okay.

A No.

Q But didn’t you—

A It explained on there. It said Auto Recovery, I believe.

Q You were led to believe that he was a dealer, though, correct?

A Not necessarily.

Tr. pp. 24-25. We cannot conclude that this record supports the trial court’s finding that Thackston was a used car dealer. In addition, we note that the trial court’s order included the finding that “Nagy purchased the Tow Truck in the ordinary course of Thackston’s usual and customary practices as a used vehicle salesman.” Appellant’s App. pp. 8. However, the record before us contains no references at all to Thackston’s business practices, customary or otherwise.

Bell also argues Nagy cannot be considered a buyer in the ordinary course of business because he did not buy the tow truck in good faith. “Good faith” means honesty in fact in the conduct or transaction concerned. Ind. Code § 26-1-1-201(19). In the case of a merchant like Nagy, however, good faith means not only honesty in fact, but also “the observance of reasonable commercial standards of fair dealing in the trade.” Ind. Code § 26-1-2-103(b). Bell argues that Nagy did not observe reasonable commercial

standards because he failed to require that Thackston deliver the certificate of title at the time of the sale. Nagy testified that he “[p]retty much rel[ies] on almost every customer’s representation that they’re going to bring me a clear—the title for their vehicle on the payoff” and that he had “never checked to see whether there’s a lien on a vehicle.” Tr. p. 28.

Under the facts and circumstances presented here, the trial court’s verbatim adoption of Nagy’s proposed finding that he was a buyer in the ordinary course of business is clearly erroneous. As the Seventh Circuit has noted, “a transaction is not in the ‘ordinary course’ under [UCC] section 9-307(1) if there are grounds for suspicion that a security interest is being imperiled by the mode of dealing.” Foy v. First Nat’l Bank of Elkhart, 868 F.2d 251, 256 (7th Cir. 1989).

Next, Bell challenges the trial court’s finding that it had entrusted Thackston with the tow truck. Bell contends it is not in the business of selling used or new vehicles and simply extended a loan to Thackston for the purchase of the truck and obtained a security interest in the truck to secure payment of that loan. Thus, Bell asserts that the trial court’s finding that it “entrusted” the truck to Thackston is not supported by the evidence.¹ We must agree. Thus, the trial court’s conclusion that Nagy took title to the truck clear of its security interest pursuant to Indiana Code section 26-1-2-403(2) is also clearly erroneous.

Conclusion

¹ Under Indiana Code section 26-1-2-403(2) (2002), any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

The trial court's conclusion that Nagy is entitled to the certificate of title to the tow truck free of Bell's security interest as both a buyer in the ordinary course of business and a buyer of an entrusted vehicle is clearly erroneous.

Reversed.

SHARPNACK, J., and KIRSCH, J., concur.